

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In re Applications of
READING BROADCASTING, INC.

For Renewal of License of
Station WTVE(TV), Channel 51
Reading, Pennsylvania

and

ADAMS COMMUNICATIONS
CORPORATION

For Construction Permit

) MM Docket No. 99-153

) File No. BRCT-940407KE

DEC - 1 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

) File No. BPCT-940630KG

To: Administrative Law Judge Richard L. Sippel

CONSOLIDATED REPLY
OF READING BROADCASTING, INC.

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SUMMARY

Adams, in its *Opposition to Reading's Motion to Dismiss Adams Application, or Alternatively, to Enlarge Issues (Abuse of Process)*, has failed to provide an adequate explanation to rebut Reading's substantial and specific evidence that Adams filed its application without any real interest or intent to build and operate a television station in Reading, Pennsylvania. Based on Commission precedent, none of the explanations offered by Adams in its Opposition diminishes the only reasonable inference that can be drawn from the totality of the evidence – the primary reason for the filing of Adams' application was speculation rather than for the legitimate purpose of operating a station.

In an attempt to show that it did not file its application for the purpose of entering into a settlement, Adams attempts to divert attention from the instant matter by resorting to a defense of its principals' actions in the *Video 44* proceeding wherein Monroe, an entity sharing common principals with Adams, dismissed its application in return for a substantial settlement payment. It is understandable why Monroe filed the Chicago application – Monroe's principals had personal knowledge of the incumbent's programming and apparently believed that they could offer something better. It is altogether different, however, when a party, without any personal knowledge whatsoever of the market or station, files against an existing station. In this case, Adams has absolutely no connection to Reading, Pennsylvania and no plausible interest in improving the programming available to viewers in Reading, Pennsylvania as Adams claims.

Adams' claim that Reading cannot show that Adams had any interest in a potential settlement is proven wrong by its retainer agreement with Bechtel & Cole, which provides a bonus to the law firm in the event that a settlement is reached that is financially favorable to Adams. Under the terms of that agreement, a settlement is as good as a complete victory.

In order to determine whether Reading was serving the public interest, Adams could have reviewed the station's public file and its quarterly issues and programs list, but it did not. Having been through a comparative renewal proceeding, Adams understood the importance of such documentation. Adams made no such effort before filing its application for Reading.

Adams claims that it undertook "extensive efforts" to determine the contents of WTVE(TV)'s programming prior to filings its competing application. However, these extensive efforts merely consisted of Adams hiring unnamed individuals to videotape WTVE(TV)'s programming for an unspecified two-week period. Adams, for unexplained reasons, did not view the videotapes until September 1999, and only then did it discover that the taped programming was that of the Home Shopping Channel on cable, not WTVE(TV). Adams' efforts even fall short of the minimal efforts deemed lacking in the *Garden State* case.

In view of the ready availability of the station's programming records and Adams' apparent knowledge that the Commission had determined that the home shopping format was not *per se* contrary to the public interest, Adams fails to

provide any explanation about how it reasonably could have arrived at the conclusion that WTVE(TV) was not serving the public interest.

Reading has presented substantial and specific evidence that Adams did not have a primary interest in constructing and operating a station in Reading, Pennsylvania. The factors relied on by Adams demonstrate no more than Adams had taken the minimal steps to makes its application credible in anticipation of receiving a settlement. Accordingly, Adams' application should be dismissed, or an abuse of process issue should be designated based on the evidence that Adams' application was filed for improper purposes and that Adams has abused the Commission's processes in prosecuting its application.

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In re Applications of)	MM Docket No. 99-153
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READING BROADCASTING, INC.)	File No. BRCT-940407KF
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For Renewal of License of)	
Station WTVE(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	File No. BPCT-940630KG
CORPORATION)	
)	
For Construction Permit)	

To: Administrative Law Judge Richard L. Sippel

CONSOLIDATED REPLY
OF READING BROADCASTING, INC.

1. Reading Broadcasting, Inc. ("Reading"), by its attorneys, hereby submits its Consolidated Reply to (a) the *Opposition of Adams Communications Corporation to "Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process)"* ("Opposition") and (b) the *Enforcement Bureau's Comments on Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process)* ("Comments"), filed November 22, 1999.

2. Background. On November 2, 1999, Reading Broadcasting, Inc. ("Reading") filed its *Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process)* ("Motion") requesting the dismissal of the pending application of Adams Communications Corporation ("Adams") on the grounds that

because the evidence presented therein showed that Adams' application was filed for speculative or other improper purposes, Adams cannot be considered a *bona fide* applicant. Alternatively, Reading requested that an issue be added to determine whether Adams has abused the Commission's processes by filing its application for speculative or other improper purposes and by filing motions in this proceeding based on false and baseless claims.

3. Adams, in its *Opposition*, opposes Reading's *Motion* by claiming there is no basis for Reading's claim that Adams Communications Corporation ("Adams") filed its application for the purpose of entering into a settlement. However, as is explained in detail below, Adams, in its *Opposition*, fails to mount any credible evidence that controverts the strong inference that the professed reasons for the filing of the Adams application lack credibility and the real reason for the filing was speculative rather than for purposes of owning and operating a television station in Reading, Pennsylvania.

4. The Enforcement Bureau (the "Bureau") opposes that part of Reading's *Motion* that seeks dismissal of Adams' application. However, with respect to the question raised by Reading regarding the *bona fides* of Adams' application, absent a detailed and documented explanation from Adams regarding the circumstances surrounding Adams' decision to challenge the WTVE(TV) renewal application, the Bureau supported the addition of an abuse of process issue. *Comments* at ¶9.

5. As explained in detail below, Adams, in its *Opposition*, has failed to provide an adequate explanation to rebut Reading's substantial and specific evidence that Adams filed its application without any real interest or intent to build

and operate a television station in Reading, Pennsylvania. Indeed, based on Commission precedent, none of the explanations offered by Adams in its *Opposition* diminishes the import of Reading's substantial and specific evidence that the primary reason for the filing of Adams' application was the possibility of obtaining a lucrative settlement.

I. The Totality Of Circumstances Is Especially Probative That Adams Filed Its Application For The Primary Purpose of Achieving A Settlement.

8. In an attempt to show that it did not file its application for entering into a settlement, or other improper purpose, Adams gives an account of its intent that is, at best, without credibility. This account principally relies on Adams' defense of the settlement by Monroe Communications Corporation ("Monroe"), an entity sharing common principals with Adams, in the *Video 44* proceeding¹ (which is not relevant to this proceeding), and the purported "extensive efforts" that Adams made to inform itself about WTVE's programming prior to filing the application.

9. Notwithstanding Adams' inadequate attempt to rebut the substantial and specific evidence set forth in Reading's *Motion*, the totality of circumstances shows that Adams filed its application for the primary purpose of speculation rather than for the legitimate purpose of operating a television station.

¹ See *Harrisclope of Chicago, Inc., et al., A Joint Venture d/b/a Video 44*, 102 FCC 2d 419 (ALJ 1985), *remanded in part and certified in part*, 102 FCC 2d 408 (Rev. Bd. 1985), *rev. granted*, 103 FCC 2d 1204 (1986), *recon. granted in part*, 3 FCC Rcd 757 (1988), *on remand*, 3 FCC Rcd 3587 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 1209 (1989), *remanded sub nom. Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir 1990), *application granted*, 5 FCC Rcd 6383 (1990), *recon. denied*, 6 FCC Rcd 4948 (1991) ("*Video 44*").

- A. The Settlement In the Video 44 Proceeding Shows That Adams' Principals And Its Counsel Were Experienced In Obtaining Settlements, And Therefore, It Logically Follows That Adams Had A Strong Motive And Incentive To Seek Out, Investigate And Determine Whether Similar Settlements Could Be Achieved By Filing Competing Applications Against Other Renewal Applicants.

10. In attempting to show that it did not file its application for the purpose of entering into a settlement, Adams attempts to divert attention from the instant matter by resorting to a defense of its principals' actions in the *Video 44* proceeding wherein Monroe dismissed its application in return for a substantial settlement payment. *Opposition* at ¶¶7-10.

11. Contrary to Adams' assertion, Reading did not claim in its *Motion* that the settlement received by Monroe was improper, or otherwise needs to be revisited. *Opposition* at ¶10. Rather, Reading's basis for claiming that Adams filed its application for speculative purposes was based on the totality of the evidence, not merely because Monroe accepted a substantial settlement payment in the *Video 44* proceeding.²

² Reading does note that Adams' stated reason for settling the Chicago case – the potential unavailability of Spanish-language programming due to the financial difficulties of one of the Spanish-language networks – is not particularly persuasive. The financial difficulties of both Telemundo and Univision were well known long before the settlement in late 1992. Moreover, the Telemundo network did not stop operating at any time, even though it did go through a bankruptcy proceeding. *See Ex. F.*

More importantly, it is interesting to compare the reaction to these financial concerns in the Chicago case with the present case. Adams knew that WTVE had recently been in bankruptcy, yet it proceeded to file its application without any financial analysis of the market or the station's prospects. *See Gilbert deposition at 14; Haag deposition at 17-18, 34-35; Steinfeld deposition at 15, 17.* This strongly suggests that Adams did not file its application for the legitimate purpose of constructing and operating a station.

12. Reading's sole purpose for presenting evidence regarding the *Video 44* settlement was to establish that, in light of that settlement, Adams' principals and its lawyers were fully aware that a substantial settlement payment was a potential outcome if a competing application was filed against Reading's renewal application for WTVE(TV). *Motion* at ¶12. Accordingly, Adams' principals had a strong motive and incentive to seek out, investigate and determine whether they could reap similar such lucrative payments by filing competing applications against other renewal applicants.

13. Reading's inference is in accord with Commission precedent. In a case with striking factual similarities to the instant one, the Commission held that, notwithstanding whether the applicant and its counsel had expressly discussed the prospects for settlement, where a party and its counsel had been involved in a prior settlement proceeding wherein the party's principals had profited substantially from the settlement, "the possibility of settlement was an inescapable reality. Thus, filing a further application for the purpose of reaching another settlement would represent an entirely logical outgrowth of [the party's] recent experience." *See WWOR-TV, Inc.*, 7 FCC Rcd 636, 641 ¶39 (1992), *aff'd sub nom. Garden State Broadcasting v. FCC*, 996 F.2d 386, 391 (D.C. Cir. 1993).

14. Moreover, in upholding that decision, the Court of Appeals concluded, "[b]ased on their experience, [the parties] were aware of the potential reward of settlement and of the dangers of discussing settlement as an objective." *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d at 391. That each of Adams' principals (other than a 1% stockholder) and their counsel, Bechtel & Cole,

were involved in the *Video 44* settlement, together with the fact that each of Adams' principals profited substantially from the settlement, establishes that Adams' principals were fully aware that settlement was a potential outcome in the event it filed a competing application for Reading, Pennsylvania, and that the amount of the settlement payment could be substantial.

15. Whether or not Adams' principals expressly discussed the prospects for settlement, the possibility of settlement was an inescapable reality. Thus, filing a further application against WTVE(TV) for the purpose of reaching another settlement would represent an entirely logical outgrowth of the Adams' principals recent experience as parties to Monroe in the *Video 44* settlement. By contrast, Adams has presented no evidence that would provide a foundation for believing that it had a primary interest in constructing and operating a television station in Reading, Pennsylvania.

B. Adams Has Not Shown That, At The Time It Prepared And Filed Its Application, It Had Obtained Particularized And Persuasive Evidence That WTVE(TV) Was Not Meeting The Public's Needs.

16. Adams claims in its *Opposition* that its challenge was premised from the inception on its perception that WTVE(TV)'s service to Reading was inadequate. In an effort to support this claim, Adams embarks (once again) on an irrelevant discussion regarding its principals' involvement in Monroe and the filing of an application for Channel 44 in Chicago. It is understandable why Monroe filed the Chicago application—Monroe's principals had personal knowledge of the incumbent's programming and apparently believed that they could offer something better. As Adams disclosed, Monroe's principals (who also are principals in Adams) were and

remain substantial businesspersons and community leaders in Chicago who were motivated by a common concern about the failure of Channel 44 to serve the public interest there. *Opposition* at ¶7. It is particularly significant that at the time of filing the Monroe application these principals had long-running and substantial ties to Chicago and that each of these principals had first-hand knowledge of Channel 44's programming.

17. It is altogether different, however, when a party, whose principals have no personal knowledge whatsoever of the market or station, files against an existing station. In this case, Adams' principals have testified that they have absolutely no connection to Reading, and more importantly, have never viewed WTVE(TV)'s programming. Thus, contrary to Adams' claims, Adams no plausible interest in improving the programming available to viewers in Reading. To the extent Adams may claim to be motivated by a business interest in operating a station in Reading (a motive attributed to Mr. Umans, but not the others), the absence of a business plan to take over an operation that had recently been in bankruptcy supports the conclusion that the application was filed for speculative purposes. *See note 2 supra*.

18. In an effort to show that it had a basis for perceiving that WTVE(TV)'s programming was inadequate, Adams discloses for the first time in its *Opposition* that, prior to preparing and filing its application, it made "extensive efforts" to evaluate the contents of WTVE(TV)'s programming. *Opposition* at ¶ 24. However, these "extensive efforts" merely consisted of Mr. Gilbert, on behalf of Adams, hiring an undisclosed number of unnamed individuals with unknown credentials to

videotape WTVE(TV)'s programming for an unspecified two-week period. Adams further claims that while the videotaping was ongoing, the unnamed person who was in charge of the taping project "regularly briefed [Mr. Gilbert] on the contents of the programming being taped." *Id.*

19. However, Adams, for unexplained reasons, did not view the videotapes until September 1999 (more than five years after filing its application), and only then did it discover that the taped programming was that of the Home Shopping channel on cable, not WTVE. *Opposition* at n.11. Upon close examination it is apparent that Adams has not claimed, nor can it, that Mr. Gilbert's discussions with the person in charge of videotaping were related to WTVE(TV)'s actual programming. This is because even if that individual viewed any actual WTVE(TV) programming during the two-week period, he obviously did not view all of the programming during the two-week period, and therefore, would be unable to provide a complete report (irrespective of whether this individual had the credentials to determine whether WTVE(TV)'s programming was responsive to the public's needs). Furthermore, in the event that the individual viewed the programming from the videotape and subsequently briefed Mr. Gilbert on its contents, it is now clear that the programming was not of WTVE(TV). Thus, although Adams claims that Mr. Gilbert was regularly briefed on the contents of the programming being videotaped, those briefings were obviously perfunctory, at best, if he was not clued in to the fact that his taping crew did not tape the right channel.

20. In order to determine whether Reading was serving the public interest, Adams could have reviewed the station's public file and its quarterly issues

and programs list, but it did not.³ Having been through a comparative renewal proceeding, Adams' principals understood the importance of such documentation.⁴ Adams made no such effort before filing its application for Reading. If Adams had checked, it would have found extensive documentation of public service programming on WTVE.

21. The fact that neither Mr. Gilbert nor apparently any other Adams principal bothered to view any of the tapes or visit Reading to view the station is significant. In view of the ready availability of the station's programming records and Adams' apparent knowledge that the Commission had determined that the home shopping format was not *per se* contrary to the public interest, Adams fails to provide any explanation about how it reasonably could have arrived at the conclusion that WTVE(TV) was not serving the public interest. The evidence shows

³ In a footnote in its *Opposition*, Adams makes the unsupportable claim that prior to the filing of Adams' application, Reading "had shut down its local television studio facilities and had ceased originating any local live programming of any sort." *Opposition* at n.11. This simply is not true. Reading notes that Adams makes this sweeping allegation without providing any support. Moreover, even if this was true (and Reading asserts that it is not), the fact that Adams would make such a discovery at this late date cannot rescue Adams' utter failure to even minimally analyze the extent to which WTVE(TV) was responsive to community needs. At the time Adams filed its application, Adams simply had no knowledge (because it failed to investigate) about whether or not WTVE(TV)'s studio facilities were operational.

⁴ Adams included as part of Exhibit A to its *Opposition*, a copy of a nearly 50-year-old law review note authored by Mr. Gilbert while a law student. In general, the note is meaningless to this proceeding other than Mr. Gilbert's acknowledgment that it is very difficult for a challenger to beat a renewal applicant. (See n.17 of the law review note.) Equipped with this knowledge, Reading questions why Adams, if it had any real interest or intent to build and operate a television station in Reading, Pennsylvania, did not attempt to assess or evaluate, in any meaningful manner, the extent to which WTVE(TV) broadcast non-commercial programming that was responsive to the community's needs.

that other than having knowledge that WTVE(TV)'s commercial broadcast programming consisted of a home shopping format, Adams did not determine, at the time it filed its application, the extent to which WTVE(TV) broadcast non-commercial public interest programming.

22. In the *Garden State* proceeding, the competing applicant had expended approximately \$30,000 for expert and technical analysis to determine whether the incumbent station's programming met the public's needs. Moreover, one of the competing applicant's principals, who was also designated as the putative general manager, testified that she had regularly watched the station's programming. In order to increase her familiarity with the station's programming, she testified that she had viewed, with greater intensity, two weeks of the incumbent station's programming and concluded that it was not serving the public interest.

23. The Commission rejected that applicant's claim that those efforts demonstrated proper intent and instead found that the competing applicant had abused the licensing process by filing its application solely in order to obtain a cash settlement. In particular, the Commission held:

If the [applicant] had established that it decided to challenge the renewal of [the station] after monitoring the station's programming for a reasonable period of time and then determining that [the station] was not responsive to the needs of [the local public], it would have greatly enhanced its argument that its challenge was bona fide.

WWOR-TV, Inc., 6 FCC Rcd 1524 n.8 (1991).

24. In the instant case, Adams' efforts at ascertaining the extent to which WTVE(TV) was responsive to the public's needs was even less than what the Commission found unacceptable in the *Garden State* proceeding. In light of the

foregoing, Adams' claims and Mr. Gilbert's testimony regarding dissatisfaction with WTVE(TV)'s local programming is incredible. Adams' paltry efforts to analyze WTVE(TV)'s local programming clearly show that Adams is not a *bona fide* applicant.

C. The Commission Has Never Vigorously Enforced Its Rule Against Settlements.

25. Adams claims that because the Commission's rules precluded for-profit settlements at the time the Adams application was prepared and filed, Adams could not have filed for purposes of making a profit. *Opposition* at ¶¶12-14. However, as Reading noted in its *Motion* (¶11), and the Bureau in its *Comments* (n.7), subsequent to the adoption of the rule which precludes for-profit settlements, the Commission has indeed allowed settlements without regard to whether the amount to be paid to the dismissing challenger exceeded that applicant's expenses. *See, e.g., Trinity Broadcasting of Florida, Inc.*, FCC 99-314 (released November 4, 1999); *EZ Communications, Inc.*, 12 FCC Rcd 3307 (1997); *FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy*, 10 FCC Rcd 12182 (1995).

26. Additionally, as Reading explained in its *Motion*, experienced communications counsel could be expected to suggest creative settlement arrangements (e.g., a "gray knight" settlement) in the event a waiver were not available. *Motion* at ¶11. *See, e.g., Frank Digesu, Sr.*, 9 FCC Rcd 7866 (Rev. Bd. 1994); *Lamar Communications, Inc.*, 6 FCC Rcd 7022 (OGC 1991); *David A. Davila, Nicasio O. Flores and Maria Norma Flores*, 5 FCC Rcd 5222 (MMB 1990). It is hardly speculative to conclude that Adams' principals and counsel can be charged

with knowledge of such cases, particularly those that were released by the Commission when the Monroe application was pending.

27. Adams also alleges that Reading approached Adams and offered to pay Adams to dismiss the settlement, but that Adams summarily rejected Reading's offer. *Opposition* at n.7. The apparent inference is that since Reading, and not Adams, initiated settlement discussions, this somehow demonstrates the *bona fides* of Adams' application. However, as explained in the Initial Decision on Remand in the *Garden State* proceeding, "[i]t is a commonly recognized principal of negotiations that it is generally more advantageous to have the opponent bid first on a settlement amount, for that amount then becomes the opponent's floor or ceiling and the non-bidding party can only improve her or his position." *WWOR-TV, Inc.*, 6 FCC Rcd 4350 at n.18 (ALJ 1991). Therefore, Adams, as the prospective recipient of a cash buyout (like the challenger in *Garden State*), would not be expected to bid first, even though Adams may have been primed for a settlement for the right amount of money at any opportunity.

D. The *Home Shopping Report & Order* Completely Undermines Adams' Professed Reason For Filing Its Application.

28. The Commission, in the *Home Shopping Report & Order*,⁵ observed that, under the Communications Act of 1934, as amended, stations with a home shopping format have the same fundamental obligation as other broadcast stations to provide programming that responds to the issues of concern to their communities of license, as well as programming that serves the needs and interests of children.

Home Shopping Report & Order, 8 FCC Rcd 5321 at ¶9. Moreover, licensees of home shopping stations, like those of all other television broadcast stations, must demonstrate to the Commission, at renewal, that the public interest will be served by renewal of their licenses. *Id.* Thus, Adams' presumption that home shopping stations do not serve the public interest is squarely inconsistent with Commission policy.

29. Reading notes that the Commission explicitly concluded in the Report and Order that home shopping stations serve the public interest. *See Home Shopping Report & Order*, 8 FCC Rcd 5321 at ¶36. In particular, the Commission noted that home shopping stations “provide valuable services to the disabled and others confined to their homes, the elderly, families without time to shop by other means, people without ready access to retail outlets or whose outlets do not stock the goods they want, people without cars or other transportation, people who dislike shopping, and people who are afraid of violent crime in conventional shopping areas.” *Id.* at ¶28. Moreover, the Commission found that home shopping stations had utilized a variety of formats, including public service announcements and program-length features, to satisfy their obligation to address the needs and interests of their local communities. *Id.* The Commission also found that licensees of home shopping stations had effectively addressed community issues such as “drug and alcohol abuse, AIDS, race relations, homelessness, basic legal knowledge

⁵ *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 – Home Shopping Station Issues*, 8 FCC Rcd 5321 (1993).

for non-English-speaking viewers, and local political debates and elections returns.”

Id. at ¶29.

30. In contrast to Adams’ claim that the Commission was cautious in finding that home shopping stations serve the public interest, Reading notes that the Commission explicitly determined that there was “no need to require such stations to modify their program formats in order to retain or obtain renewal of their licenses” and further, that the record in the Home Shopping proceeding showed that there was “no detriment to the public caused by existing program operations” *Id.*

31. As Adams correctly quoted, the Commission found that:

Based upon the record before us, it appears that the chosen format of home shopping stations generally does not preclude them from adequately addressing the needs and interests of their communities of license. We observe that we have never denied the license renewal application of any home shopping station, thus indicating that these stations have been able to meet the Commission’s standards on public affairs programming responsive to issues confronting the local community, as well as standards on indecency and political or emergency broadcasting. Indeed, with regard to serving the needs and interests of children, as with all public interest considerations, home shopping stations must comply with the same rules that apply to other television broadcast stations.

Id. at ¶31.

32. However, rather than construing that passage as mere “cautious” support for the home shopping format, Reading believes that the passage illustrates that, absent a particularized showing otherwise, the Commission generally

presumes that home shopping stations serve the public interest, convenience and necessity, as it similarly presumes of any other commercial television station.

33. As stated in its *Opposition*, Adams' principals "have uniformly testified that they chose to challenge RBI's renewal because they do not, and did not, believe that the home shopping television format serves the public interest." *Opposition* at ¶16. Adams' position apparently is that its steadfast skepticism about the public interest validity of home shopping programming, even in the face of a contrary holding by the Commission, constitutes persuasive evidence, and therefore, provides a sufficient basis for it to reasonably conclude that WTVE(TV), at the time Adams filed its application, was not serving the public interest.

34. In an attempt to justify this position, Adams (once again) makes an irrelevant comparison to the *Video 44* proceeding. *Opposition* at ¶¶21-22. In the *Video 44* proceeding, Monroe filed its application to challenge the operation of a subscription television ("STV") station airing sexually-related programming. See *Opposition* at ¶7. Adams, in its *Opposition*, makes the unremarkable observation that the Commission obligated licensees of STV stations to provide programming that was responsive to issues of concern to the local community. (Adams' observation is unremarkable because the Commission imposes this same obligation on all television broadcast stations.)

35. However, Adams neglects to discuss the critical difference between its principals' involvement in Monroe and the filing of an application for Channel 44 in Chicago, and its principals' involvement in Adams and the filing of an application for Channel 51 in Reading. In the *Video 44* proceeding, the Monroe principals were

active community leaders who had first-hand knowledge of Channel 44's programming. This allowed Monroe to form a conclusion about the station's record based on particularized and persuasive evidence before filing its application against Channel 44.

36. In the instant case, the Adams principals have absolutely no connection to Reading, and more importantly, have never viewed WTVE(TV)'s programming. Thus, Adams' conclusion that WTVE(TV) was not responsive to local needs was based solely on its presumption that stations broadcasting home shopping programming do not serve the public interest, despite the Commission's contrary conclusion and despite the fact that WTVE(TV) and other home shopping stations have provided local public interest programming on a daily basis.

37. Adams attempts to make credible its presumption by merely pronouncing that its principals steadfastly believe that the home shopping television format does not serve the public interest. Although Adams' principals certainly are entitled to have an opinion on the matter, their opinion nevertheless cannot override a (then) recent Commission order which unequivocally held that home shopping generally serves the public interest, particularly when Adams' opinion has no foundation in fact and is apparently premised on a totally lacking, or at best, a completely inadequate analysis of WTVE(TV)'s non-commercial programming efforts.

E. Adams' Fee Arrangements With Its Counsel Provides For A Bonus Payment In the Event Of Settlement.

38. Adams claims that Reading has no evidence showing any interest by Adams in arranging a settlement. Adams' overblown arguments overlook its

retainer agreement with Bechtel & Cole, which provides for the same 100% bonus to the law firm if the case is won or settled on terms that are financially favorable to Adams (i.e., reimbursement of expenses or better). *See* Ex. A.

39. Adams also claims that Reading's argument about the fee arrangement is "fatally flawed" because at the time Adams application was prepared and filed, the Commission's rules absolutely precluded for-profit settlement. *Opposition* at ¶¶11-15.

40. However, in spite of Adams' brazen assertion, Adams fails to explain why its fee arrangement with its counsel, Bechtel & Cole, provides for a payment at twice its hourly rate in the event that "the Adams proceeding is resolved through a settlement which is economically favorable for Adams." *See* Ex. A. In the *Garden State* proceeding, the ALJ found that a 10% settlement bonus provided for in the retainer agreement to be relevant evidence of an intent to settle. *See WWOR-TV, Inc.*, 6 FCC Rcd 4350 at ¶44 (ALJ 1991), *motion to strike denied*, 7 FCC Rcd 636 (1992), *aff'd sub nom. Garden State Limited Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). Likewise, in this case, the fee arrangement itself contemplates a for-profit settlement, notwithstanding the rule against for-profit settlement.

41. It is also interesting that the fee arrangement that exists between Adams and counsel is noticeably different than the fee arrangement that existed between Monroe and counsel. With Monroe's representation, the fee arrangement provided that, in the event that Monroe's application was granted, counsel would be paid at twice their usual hourly rate. However, in the event that Monroe's application ended in settlement, counsel would only be paid at its usual hourly rate.

In contrast, Adams' fee arrangement with counsel provides that it will be paid at twice their usual hourly rate in the event that either Adams' application is granted or the Adams proceeding is resolved through a settlement which is economically favorable for Adams. This is compelling evidence that the primary reason for the filing of Adams' application was the possibility of obtaining a lucrative settlement.

F. The Deposition Testimony Of Adams' Principals Shows That The Principals Were, At Best, Indifferent To The Mechanism By Which The Return On Their Respective Investment Might Be Produced.

42. Because Adams, on October 15, 1999, caused the Presiding Officer to order Reading's depositions of the Adams principals to halt by falsely claiming that Reading's counsel had a conflict of interest in the case, Reading was unable to complete the depositions of Adams' remaining principals until November 12, 1999.

43. As expected, the deposition testimony of the remaining Adams' principals does not demonstrate a primary interest in broadcast ownership. Rather, the testimony confirms that Adams' investors viewed the comparative renewal challenge process primarily as a means to reap substantial rewards rather than out of concern about WTVE(TV)'s programming.

44. For example, Robert Haag, Adams' president, director and substantial investor holding a 41.6 % interest, testified that although Mr. Gilbert had told him that WTVE "was not providing public access or doing something for the community" (See Ex. B at 7), his motivation for becoming involved in Adams was because "[i]t was a business opportunity." See Ex. B at 31. For convenience, Mr. Haag's testimony (Tr. at 31) is produced, in part, below:

Q (Mr. Hutton). And what motivated your decision to become president and substantial stockholder of a company applying for the

channel in Reading, Pennsylvania?
A (Mr. Haag). It was a business opportunity.

45. Similarly, Manfred Steinfeld, a director and 8.7 % interest holder in Adams testified that his involvement with Adams is as a business venture. *See Ex. C at 6.* For convenience, Mr. Steinfeld's testimony (Tr. at 6) is produced, in part, below:

Q (Mr. Hutton). How did you come to be involved in Adams Communications?

A (Mr. Steinfeld). I've been involved in a number of other business ventures with Mr. Gilbert and Mr. Haag, real estate ventures, and also other business activities, in addition to being neighbors. We all live in the same section for many years.

46. Finally, Mr. Podolsky, a 7% interest holder in Adams testified that his involvement in Adams was limited to his investment. *See Ex. D at 5.* For convenience, Mr. Podolsky's testimony, in relevant part, is produced below:

Q (Mr. Hutton). And what did they tell you about why they were forming Adams Communications?

A (Mr. Podolsky). They asked me if I would like to go into an investment. I don't know if it was an investment even. Into a deal with them. That they had 7 percent for me. And I said yes. At that time, I don't even think I knew what the name was. That's the way we all are.

47. Although the testimony of the Adams principals does not rule out the possibility that Adams was interested in acquiring WTVE(TV) through the comparative renewal process, the casual nature of the decision to form and file the application, together with the fact that each of the principals have testified that they have absolutely no connection to Reading, and more importantly, have never viewed WTVE(TV)'s programming, tends to negate any notion that Adams was in

fact motivated by an interest in owning and operating a station in Reading, Pennsylvania to improve the programming there, as claimed by Mr. Gilbert.

II. Reading, In Its Motion, Made The Requisite Strong Threshold Showing That Adams Abused The Commission's Processes By Asserting Meritless Claims.

48. The Bureau, in declining to support Reading's claim that Adams abused the Commission's processes by asserting meritless claims against Reading in its motions to enlarge issues and its claim of an unusually poor broadcast record by Reading, applied a "five-part test" that purportedly was established to determine whether a petition to deny had been filed for an improper or obstructive purpose.

Comments at ¶8.

49. Rather than establishing a strict five-part test that must be satisfied before an abuse of process issue can be added, the Commission, in *Radio Carrolton*,⁶ merely set forth principal factors which the Commission considers as significant indications that a petition to deny was filed primarily or substantially for purpose of delay. *Id.* at ¶26. The Commission recognized that, depending on the particular facts, these factors "may or may not all be present in the same case." *Id.* Therefore, the Presiding Officer need not find that Reading has shown that each factor is present before adding the requested issue. Rather, the Presiding Officer need only find that Reading has made a strong threshold showing that the primary and substantial purpose behind Adams' filings was for an improper or obstructive purpose. *Id.* at ¶¶25-27; *see also RKO General, Inc. (WOR)*, 4 FCC Rcd 4072, 4073 (¶7) (The Commission will not infer improper purpose in filing an application or